
BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF

IMPLEMENTATION OF SECTIONS 202(F), 202(I),
AND 301(I) OF THE TELECOMMUNICATIONS ACT OF 1996

CABLE TELEVISION ANTITRAFFICKING, NETWORK TELEVISION,
AND MMDS/SMATV CROSS OWNERSHIP RULES

RECEIVED

MAY - 8 1996

CS Docket No. 96-56

DOCKET FILE COPY ORIGINAL

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**PETITION FOR RECONSIDERATION, OR, IN THE
ALTERNATIVE, PETITION FOR A RULEMAKING BY
NETWORK AFFILIATED STATIONS ALLIANCE**

WADE H. HARGROVE
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD
Post Office Box 1800
Raleigh, N.C. 27602
(919) 839-0300
*Counsel for the ABC Television
Network Affiliates Association*

KURT A. WIMMER
GERARD J. WALDRON
CATHERINE J. DARGAN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000
*Counsel for the CBS Television
Network Affiliates Association*

WERNER K. HARTENBERGER
DOW, LOHNES & ALBERTSON
A Professional Limited Liability Company
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802
(202) 776-2000
*Counsel for the NBC Television
Network Affiliates Association*

No. of Copies rec'd 0+4
List ABCDE

May 8, 1996

SUMMARY

The Network Affiliated Stations Alliance ("NASA"), a coalition of the affiliate associations of the ABC, CBS and NBC Television Networks that represents the more than 600 television broadcast stations affiliated with these three networks, urges the Commission to reconsider its decision to eliminate the cable/broadcast network cross-ownership rule without determining, as directed by Congress, whether certain safeguards are necessary. In the alternative, NASA requests that the Commission initiate a rulemaking proceeding to determine what safeguards are necessary to protect the viewing public and local broadcasters from potential abuses by cable/broadcast network combinations.

The recently enacted Telecommunications Act of 1996 (the "1996 Act") requires the Commission to both remove the cable/broadcast network cross-ownership restriction *and* to revise its regulations, if necessary, to "ensure carriage, channel positioning, and non-discriminatory treatment of non-affiliated broadcast stations by a cable system [affiliated with a broadcast network]." 1996 Act at § 202(f)(2). The regulation promulgated by the Commission eliminates the rule, but the Commission did not even consider imposing safeguard protections. Indeed, in contravention of the Administrative Procedure Act, interested and affected parties were given no opportunity to even comment upon whether such safeguards are necessary and what safeguards should be considered and adopted.

By lifting the cable/broadcast network cross-ownership restriction before implementing safeguards, the Commission has placed viewers and broadcasters in a vulnerable position and has left the Commission ill-equipped to address public concerns

once a common ownership has been proposed. Diversity of programming, licensee autonomy and the viability of free, over-the-air broadcast television require that the Commission at least consider implementing strong regulatory safeguards to counter anticompetitive actions of cable/broadcast network conglomerations before these combinations form, rather than after.

The public should be given the opportunity to comment on the necessity of safeguards and to propose workable and nonintrusive solutions that protect both the competition and diversity of programming. As NASA has familiarity with these issues, this petition summarizes several proposed safeguards that the Commission may consider in a rulemaking proceeding.

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
INTRODUCTION	1
I. THE PUBLIC SHOULD HAVE BEEN AFFORDED APA NOTICE AND COMMENT PROCEDURES BEFORE WHOLESALE ELIMINATION OF THE CABLE/BROADCAST NETWORK CROSS-OWNERSHIP RULE WITHOUT PROTECTIVE SAFEGUARDS	2
A. By Declining to Determine if Safeguards Should Be Enacted Upon the Lifting of the Restriction on Cable/Broadcast Network Cross-Ownership, the <i>Order</i> Violates the APA and Defies Congress' Mandates Under the 1996 Act	3
B. The Failure to Initiate a Rulemaking, Offering Notice and Comment Opportunities to NASA and Other Interested Parties, Poses Significant Harm to Both Local Broadcast Stations and the Public	6
II. SAFEGUARDS ARE NECESSARY TO ACCOMPANY LIFTING OF CABLE/BROADCAST NETWORK CROSS-OWNERSHIP BAN, AND THEY SHOULD BE IN PLACE <i>BEFORE</i> THE BAN IS LIFTED, NOT AFTER SERIOUS PROBLEMS ARISE	8
A. Waiting Until After a Large Merger Is Proposed to Consider Necessary Safeguards Leaves Broadcasters and the Public Vulnerable and the Commission Ill-Equipped to Address Serious	9
B. Strong Regulatory Safeguards Are Essential to Protect Local Broadcasters and the Viewing Public From Anti-Competitive Actions of Cable/Broadcast Network Conglomerates	10
1. Effective Competition	11
2. Structural Protections	12
a. Must-Carry, Channel Positioning, and By-Pass Protection	12
b. General Non-Discrimination Protection	14
3. Preserve Essential Network-Affiliate Rules	16
CONCLUSION	17

RECEIVED

MAY - 8 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of Sections 202(f), 202(i), and 301(i))	CS Docket No. 96-56
of the Telecommunications Act of 1996)	
)	
Cable Television Antitrafficking, Network Television,)	
and MMDS/SMATV Cross Ownership Rules)	
)	
TO: The Commission)	

**PETITION FOR RECONSIDERATION, OR,
IN THE ALTERNATIVE, PETITION FOR A RULEMAKING BY
NETWORK AFFILIATE STATIONS ALLIANCE**

INTRODUCTION

The Network Affiliated Stations Alliance ("NASA" or "Affiliates"), a coalition of the affiliate associations of the ABC, CBS and NBC Television Networks that represents the more than 600 television broadcast stations that are affiliated with these three networks, urges the Commission to (1) reconsider its decision to completely repeal the cable/broadcast network cross-ownership rule and (2) to initiate a rulemaking proceeding, as directed by Congress, to determine whether safeguards are necessary if the cable/broadcast network cross-ownership restriction is repealed.^{1/}

^{1/} This petition is made pursuant to §§ 1.106 and 1.401 of the Commission's rules. The Petition is timely filed within 30 days from the date of public notice of the final Commission action. 61 Fed. Reg. 15387 (April 8, 1996).

I. THE PUBLIC SHOULD HAVE BEEN AFFORDED APA NOTICE AND COMMENT PROCEDURES BEFORE WHOLESALE ELIMINATION OF THE CABLE/BROADCAST NETWORK CROSS-OWNERSHIP RULE WITHOUT PROTECTIVE SAFEGUARDS.

Under § 202(f) of the recently enacted Telecommunications Act of 1996 (the "1996 Act"), the Commission was required to revise its regulations to allow a person or entity to own or control a network of broadcast stations and a cable system upon adoption of certain safeguards. *See* 1996 Act at § 202(f)(1). The Commission, therefore, issued a new rule providing that the cable/broadcast network cross-ownership restrictions "shall not apply to any franchise area in which a cable operator is subject to effective competition as determined under section 623(l) of the Communications Act." 47 C.F.R. § 76.501(f).

As part of the requisite safeguards, the Commission was directed by Congress to revise its regulations to "ensure carriage, channel positioning, and non-discriminatory treatment of non-affiliated broadcast stations by a cable system [affiliated with a network]." 1996 Act at § 202(f)(2). Regrettably, the Commission failed to follow that second part of the § 202(f) mandate. Rather than initiating a rulemaking proceeding to determine if safeguards are necessary upon the lifting of the cable/broadcast network cross-ownership restriction, the restriction was simply eliminated outright. The *Order* merely noted a caveat in a footnote promising to revisit the issue of safeguards later, if the response to lifting the ban indicates that such "additional rule changes" are necessary. *See Order*, Implementation of §§ 202(f), 202(i) and 301(i) of the Telecommunications

Act of 1996, Cable Television Antitrafficking, Network Television, and MMDS/SMATV Cross-ownership Rules, CS Docket No. 96-56 (March 18, 1996) (the "*Order*") at 2, n.3.

A. By Declining to Determine if Safeguards Should Be Enacted Upon the Lifting of the Restriction on Cable/Broadcast Network Cross-Ownership, the *Order* Violates the APA and Defies Congress' Mandates Under the 1996 Act.

The *Order* abruptly ended the administrative proceeding before it ever began, foreclosing the filing of comments by interested parties and any reasoned analysis of the necessity of putting safeguards in place *before* the cross-ownership restriction was lifted. The *Order*, which has been classified as a "final rule" in the Federal Register, lifts the ban on cable/broadcast network cross-ownership without imposing any safeguards. Indeed, the *Order* only states that the Commission will "monitor the response" to the new rule lifting the ban before determining whether any safeguards are necessary. The *Order* takes this radical position in the face of an explicit statutory direction by Congress to revise its rules to implement safeguards if they are necessary. *See* H.R. CONF. REP. NO. 458, 104th Cong. 2d Sess. 163 (1996). Moreover, the *Order* ignores that the safeguards were an integral part of the final resolution of this contentious issue. Indeed, Senator Hollings, ranking Democrat on the Senate Commerce Committee, submitted a document in the *Congressional Record* indicating how some twenty-nine issues were ultimately resolved. Under item #2, "Media Ownership," it states: "Network-cable: allow networks to buy cable systems *subject to FCC safeguards*." 142 CONG. REC. S689 (daily ed. Feb. 1, 1996) (emphasis added). This statement, not contradicted by any other statement in

law, the Conference Report or floor debate, demonstrates the clear will of Congress that the cable/broadcast network rule would be repealed *only* when appropriate safeguards were in place.

Instead of following the intent of Congress, the *Order* expresses a unilateral decision that such safeguards are currently not necessary, summarily adopting a "wait-and-see" approach to administrative rulemaking. Not only does the *Order* avoid carefully weighing arguments that the safeguards are necessary, but it declined to consider the issue at all. Equally important, no opportunity for comment of any kind was provided to the public.

The Administrative Procedure Act ("APA") requires that notice and an opportunity to participate in the rulemaking proceeding, usually by offering comments, be afforded to the public. *See* 5 U.S.C. § 553. Such a procedure is not necessary (1) when the administrative agency seeks merely to issue interpretive rules, general statements of policy or rules of agency organization, procedure, or practice; or (2) when the agency, for good cause, finds (and states the findings and reasons relied upon) that notice and public procedures are impracticable, unnecessary, or contrary to the public interest. *Id.* In this case, the rule change at issue is substantive and was unaccompanied by any findings of fact or reasoned explanation. The *Order* by-passes and eliminates the rulemaking process altogether -- offering neither notice nor opportunity to comment before repealing the cable/broadcast network cross-ownership rule

The notice and comment requirements of the APA are in place to guard against precisely this situation. Rather than thoughtfully considering whether regulatory safeguards are necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated stations by cable/broadcast network combinations, with the assistance of comments from interested parties, the *Order* jumps to the conclusion that such protections are not necessary at all -- at least for the time being. The *Order*'s failure to articulate any reasoned explanation for depriving the public of the opportunity to participate in a rulemaking proceeding, and its failure to list any findings that would justify such an action, renders its lifting of the ban in the absence of safeguards void. See International Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795 (D.C. Cir. 1983) (Agency's failure to cogently explain why it has exercised its discretion in a given manner renders its decision arbitrary and capricious).

The *Order*'s cursory decision and discussion of the cable/broadcast network cross-ownership rule denies NASA and other interested parties the procedural protections furthered by the APA. As noted above, the *Order*'s announcement that safeguards were not necessary at this time was not grounded on any apparent findings of fact. There was no reasoned consideration of necessary safeguards, nor was there any clear explanation as to why safeguards would not be considered until after some problem developed.

Notably, Congress expressly contemplated that the Commission's regulations would be amended, if necessary, to provide for modification of the cable/broadcast network rule. According to the Conference Report of the 1996 Act, "[i]f

necessary, the Commission is directed to revise its rules to ensure carriage, channel positioning and nondiscriminatory treatment of non-affiliated broadcast stations affiliated with a broadcast network." H.R. CONF. REP. NO. 458, 104th Cong. 2d Sess. 163 (1996). Certainly, to determine whether the safeguards are "necessary," a notice and comment proceeding has to be initiated.

Significantly, several congressmen expressed, quite clearly, their reservations concerning the repeal of the cable/broadcast network cross-ownership restriction. See H. REP. NO. 204, 104th Cong. 1st Sess. 220 (1995) (noting that "[i]f a national TV network owns a cable system serving a particular locality, it would have tremendous incentive to bypass its affiliate and put its national programming directly on the cable system. We believe repeal of this rule is unwarranted and would have anticompetitive effects") (Dissenting views of Edward J. Markey, Gerry E. Studds and Ron Klink). These comments highlight obvious potential problems that may arise as a result of the rule's repeal which may necessitate safeguard protections for local stations and the public.

B. The Failure to Initiate a Rulemaking, Offering Notice and Comment Opportunities to NASA and Other Interested Parties, Poses Significant Harm to Both Local Broadcast Stations and the Public.

The Commission conducted a full-scale rulemaking process only four years ago and determined, based on a complete record and hundreds of pages of public comments, that the rule should be retained with significant safeguards.^{2/} In contrast, the

^{2/} See MM Docket No. 82-424.

Commission's recent "amendment" of § 76.501(b) actually amounts to deleting the entire rule. Unfortunately, the decision that no safeguards are necessary at this time will cost local broadcasters and the viewing public. The failure to conduct a formal rulemaking proceeding has a potentially devastating effect on local broadcast stations and on free, over-the-air broadcast television^{3/}. Consequently, the Commission's failure to afford an opportunity for notice and comment to interested parties has significant consequences. Surely, the Commission could not have intended to foreclose any opportunity to implement necessary safeguards, or even discussion of which safeguards were needed, before tremendous injury is caused. Thus, we ask the Commission to reconsider this *Order*, or to initiate a rulemaking proceeding to consider appropriate safeguards.

Enacting the *Order*'s proposed "amendment" (repeal) prior to establishing the required safeguards puts all broadcast stations at tremendous risk. By hurriedly bypassing the traditional notice and comment rulemaking proceedings before eliminating the cable/broadcast network cross-ownership restriction, the *Order* places local broadcast stations in a position where they could be subjected to anticompetitive behavior by cable/broadcast network combinations. The network cross-ownership restriction had traditionally served the dual goals of promoting competition and diversity by limiting the unquestionable market power of cable operators vis-à-vis local broadcast stations and,

^{3/} The Commission has now opened the floodgates for the formation of cable/broadcast network combinations. Because the Commission did not establish safeguards, there is nothing to prevent a merger that would harm diversity of programming in local markets. Establishing safeguards in the context of a specific merger will likely be difficult, contentious and politically charged without providing guidance to the industry as a whole.

additionally, by protecting the autonomy and independent programming judgment of local television stations. Merely lifting the ban on cable/broadcast network cross-ownership without implementing accompanying safeguards dramatically tilts the balance of power toward both cable systems and networks, upsetting the delicate equilibrium that traditionally governed those entities' relationships with local broadcast stations.

II. SAFEGUARDS ARE NECESSARY TO ACCOMPANY LIFTING OF CABLE/BROADCAST NETWORK CROSS-OWNERSHIP BAN, AND THEY SHOULD BE IN PLACE *BEFORE* THE BAN IS LIFTED, NOT AFTER SERIOUS PROBLEMS ARISE.

Safeguards are necessary now, before abuses occur, not after. Establishing safeguards only after abuses have been demonstrated is precisely backward -- safeguards are intended to prevent abuses rather than remedy them after the damage has been done. As a practical matter, not putting safeguards in place at the outset makes it difficult (if not impossible) to institute such protections later and lessens their value.

Understandably, with the spotlight of the nation on the Commission, there has been intense pressure to quickly implement the mandates of the new 1996 Act. The Commission has done an admirable job thus far, but in this case, the Commission has erred. Broadcast stations and the viewing public must not become casualties of the confusion surrounding the implementation of the new law. NASA strongly urges the Commission to reconsider its decision to abandon safeguards that are necessary to ensure carriage, channel positioning, and non-discriminatory treatment of non-affiliated broadcast

stations by cable systems affiliated with television networks. At minimum, the Commission should initiate a rulemaking proceeding to study this question.

A. Waiting Until After a Large Merger Is Proposed to Consider Necessary Safeguards Leaves Broadcasters and the Public Vulnerable and the Commission Ill-Equipped to Address Serious Concerns.

Experience tells us that it is very difficult to rectify a bad situation after the fact; recent Commission history confirms that view. It is that experience that raises the concern that elimination of the cable/broadcast network cross-ownership restriction without first having appropriate safeguards in place will turn into a bad situation impossible to rectify.

The cable industry of today often consists of very large multiple system operators ("MSOs") which are tremendously powerful relative to broadcast stations in their markets.^{4/} For many years, the cable/broadcast network cross-ownership rule was an important restraint on cable market power. Before dismantling this protective rule, Congress specifically required that safeguards were to be considered to protect local broadcasters and the viewing public.

A thorough examination of which safeguards are necessary to protect broadcasters and the public upon elimination of the cable/broadcast network cross-

^{4/} See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, CS Docket No. 95-61 (December 11, 1995), ¶ 194 (concluding that cable operators still exercise substantial local market power despite remarkable gains made by direct broadcast satellite and wireless cable providers). As of 1995, TCI and Time Warner alone served over 40% of all subscribers nationwide. See *Id.* at Appendix G, Table 2. The top four cable MSOs together will, if all pending deals go through, serve approximately 61.3% of all cable subscribers nationwide, and the percentage of subscribers served by the 10 largest MSOs will increase to almost 80%. *Id.* at ¶ 141.

ownership rule is essential. As NASA is very familiar with this issue and has commented on necessary safeguards in prior proceedings, below is a brief discussion of possible safeguards that should be adopted by the Commission in a rulemaking proceeding.^{5/}

B. Strong Regulatory Safeguards Are Essential to Protect Local Broadcasters and the Viewing Public From Anti-Competitive Actions of Cable/Broadcast Network Conglomerates.

Both effective competition *and* structural protections are necessary to protect the delicate and complex relationship between local stations and both cable systems and networks. Behavioral restrictions include must-carry and channel-positioning protections, local station by-pass protection, local station non-discrimination protection, and the retention of existing network-affiliate rules.

NASA's suggested safeguards to accompany repeal of the rule would include, at a minimum: (1) a requirement of effective competition; (2) a system of structural protections including must-carry, channel positioning, and by-pass protection, and general non-discrimination requirement; and (3) preservation of the current network-affiliate rules. Local and national ownership caps, as well as behavioral restraints, have been considered and approved by the Commission in the past.^{6/}

^{5/} We would expect that a great number of proposals for effective safeguards would emerge from the rulemaking process, and NASA likely will have further suggestions during that process. The purpose of this section is to illustrate a number of safeguards that would be effective rather than to propose a dispositive list of potential safeguards.

^{6/} See *Report and Order*, Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Systems and National Television Networks, MM Docket No. 82-434, 7 F.C.C.R. 6156 (June 18, 1992), *aff'd*, *Memorandum and Order*, 8 F.C.C.R. 1184, ¶¶ 9, 18 (February 5, 1993) (acknowledging that local caps are necessary and applying a local cap of 50% of homes passed by a cable-network combination within an ADI and a national

These suggested safeguards are protective measures to promote diversity of programming with only minimal intrusion in the video marketplace. Each of these safeguards are discussed in more detail below.^{2/}

1. Effective Competition.

The most important safeguard to protect the public and local broadcasters is competition. Ensuring that effective competition exists in the video marketplace is of primary importance. A simple solution that the Commission could adopt would be to permit cable/broadcast network combinations to enter only those markets in which they would provide a second or "competing" cable service to an effective competitor or where some other multichannel video provider offers carriage of local television stations. Such a restriction would reduce risks to competition in the local video marketplace and would offer a substantial check on cable market power. *See* Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 F.C.C.R. 4962, 5011 (1990) ("the introduction of competition at the local level" is the optimum restraint on cable power). Where a cable/broadcast network combination is

cap of 10% of homes passed nationwide; adopting a remedial scheme to address specific instances of discriminatory behavior by cable-network combinations including carriage requirements and broadcaster petitions for special relief).

^{2/} All of these proposed provisions or safeguards are interrelated, such that should any one of them be struck down or substantially altered by judicial action, NASA recommends that the Commission initiate a rulemaking proceeding to re-examine the effectiveness of the entire structure. The Commission should require such a proceeding in the event of judicial challenge to the proposed safeguards. Moreover, the Commission should expressly note that these safeguard provisions do not preempt in any way the federal or state antitrust or unfair competition laws.

interested in acquiring an existing cable system, the Commission should first determine whether that system is subject to "effective competition." The "effective competition" standard has been employed as a useful guide in both the cable rate regulation and the multichannel, multipoint distribution system (MMDS) contexts. *See* 47 C.F.R. §§ 76.905 and 76.33.

Requiring that a second multichannel video provider be available in a market that a cable/broadcast network combination wishes to enter would promote Congress' goals of ensuring carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast systems. As no one cable system could monopolize a given market where "effective competition" exists, cable/broadcast network combinations could not exert undue influence over their affiliates or discriminate against nonaffiliated stations. Thus, this safeguard is critical to minimize anticompetitive and discriminatory behavior.

2. Structural Protections.

a. Must-Carry, Channel Positioning, and By-Pass Protection

NASA supports the current must-carry/channel positioning requirements set forth in the 1992 Cable Act. Regardless of the outcome of the various constitutional challenges to the current must-carry system as to regular cable systems, a must-carry/channel positioning requirement should be applied to cable/broadcast network combinations. Such combinations have a unique ability and incentive to engage in anticompetitive behavior toward local stations that will reduce diversity in local markets,

to the detriment of the local viewing public. Must-carry and channel positioning protection may, in combination with effective competition and nondiscrimination protections, prevent or eliminate the incentive of cable/broadcast network combinations to by-pass local stations in favor of substituting national programming directly to local co-owned cable systems. Such restrictions require that cable systems continue to give broadcast stations comparable positions in the programming lineup.

Even with must-carry and channel position protections, however, cable/broadcast network combinations may find it economically feasible, especially with increased technological capabilities, to drop altogether their affiliations with certain local television stations in favor of placing their network programming directly on cable systems or importing distant signals of affiliates. Thus, cable/broadcast network combinations may use the threat of disaffiliation to exert market power over local affiliates, hindering both competition and diversity in the local community. Accordingly, the Commission should combine must-carry and channel position protections with a requirement that any cable/broadcast network combination must affiliate with at least one station licensed in each ADI in which it owns or is affiliated with a cable system. Similarly, networks should not be allowed to discriminate against local broadcast stations in favor of their broadcast network-cable system combinations in making syndicated off-network programming available.

b. General Non-Discrimination Protection

The summary deletion of the cable/broadcast network cross-ownership rule has greatly endangered independent as well as affiliated broadcast stations. NASA supports a broad interpretation of the statute to allow the proposed safeguards to protect both affiliated and independent stations from network discrimination. Stations that are not affiliated with the cable/broadcast network combination in their area, which include all other stations -- independent stations and stations affiliated with rival networks -- could potentially face discrimination from the cable/broadcast network combination. For network affiliated stations, this discrimination will be especially intense if the must-carry regulations are struck down. Even without regard to must-carry, cable/broadcast network combinations will have little incentive to negotiate retransmission consent agreements with affiliated stations in good faith.

The must-carry/channel positioning and by-pass protections are inadequate to fully protect local stations because they largely aim at preventing abuses of ordinary cable operators, instead of specifically addressing abuses of cable/broadcast network combinations. Consequently, those protections do not fully account for the several ways in which power may be exploited in the network-affiliate relationship. Network-affiliated local stations will likely be vulnerable to additional undue pressure by cable/broadcast network combinations to increase clearance of network programs, to accept lower network compensation, and to seek less temporal and geographic exclusivity. Additionally, under current law, local stations may simultaneously negotiate with a cable/broadcast network

conglomeration on both issues of retransmission consent compensation and network compensation. Under such circumstances, it is unlikely that affiliates will obtain fair market value for their services.

To address these threats, the Commission should adopt a broad prohibition against discrimination by cable/broadcast network combinations against their local affiliates. Specifically, the Commission should require that the cable/broadcast network combination should:

- (1) compensate its affiliates in markets where it is affiliated with a cable system at a rate which is at least as favorable as that offered by the cable/broadcast network combination to comparable affiliates with comparable circumstances in markets in which the cable/broadcast network does not own cable systems;
- (2) afford non-duplication protection on terms at least as favorable as those offered to comparable affiliates under comparable circumstances in markets in which the cable/broadcast network does not own a cable system;
- (3) grant all requests for syndicated exclusivity protection and not condition cable carriage, channel positioning or compensation for carriage on a station's forbearance of these rights;
- (4) extend other affiliation terms to an affiliate in a market in which it is affiliated with a cable system that are at least as favorable as those offered to other comparable affiliates under comparable circumstances in which the cable/broadcast network does not own a cable system;
- (5) compensate all local stations and markets where it is affiliated with a cable system for cable carriage at a per-subscriber rate at least as favorable as that paid by non-network-owned-and-operated cable systems in that market; and
- (6) not retaliate in any fashion against an affiliate that brings a violation of these rules to the attention of the Commission.

A rulemaking proceeding on safeguard protections would afford independent stations the opportunity to comment on the particular discrimination they may face by cable/broadcast network combinations.

3. **Preserve Essential Network-Affiliate Rules.**

Finally, the Commission should retain existing rules that define the network-affiliate relationship and afford local stations a measure of protection against networks. The three core network-affiliate rules are the "right to reject rule,"^{8/} the time option rule,^{9/} and the "exclusive affiliation" rule.^{10/} Additionally, the Commission should maintain its longstanding prohibition on overreaching "incentive compensation plans."^{11/} These core network affiliate rules as an integrated whole should be retained.^{12/} These three essential rules permit network affiliates effectively to serve their

^{8/} The "right to reject" rule, 47 C.F.R. § 73.658(e) (1990), prohibits a network from "preventing" or "hindering" network affiliates from rejecting network programming that the licensee station reasonably believes to be unsatisfactory or contrary to the public interest or from substituting for network programming any program "which, in the station's opinion, is of greater local or national importance." (1995). The right to reject rule has been viewed as the "most salient example" of the Commission's fulfillment of its statutory obligation to serve the public interest. See Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1040 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983).

^{9/} The "option time" rule, 47 C.F.R. § 73.658(d) (1995), prevents a network from "optioning" an affiliate's time or engaging in practices that have "the same restraining effect as time optioning."

^{10/} The "exclusive affiliation" rule, 47 C.F.R. § 73.658(a) (1995), prohibits networks from "preventing" or "hindering" affiliates from or penalizing an affiliate for "broadcasting the programs of any other network organization."

^{11/} See Columbia Broadcasting System, Inc., 22 R.R. 265, 270 (1961); Application of Section 3.658(a) of the Commission's Rules. 23 R.R. 769, 780 (1962)

^{12/} See NASA's Comments In re Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates, MM Docket 95-92 (October 30, 1995) and Reply Comments (November 27, 1995).

communities of license and to maintain control over their own programming. Ultimately, the core network-affiliate rules would assist in protecting against abuses by network-owned cable systems, allowing greater diversity of programming and truly serving the public interest.

CONCLUSION

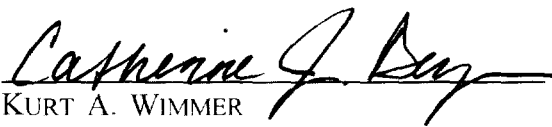
The *Order*'s summary elimination of the cable/broadcast network cross-ownership rule completely foreclosed the opportunity to initiate proper rulemaking proceedings without any determination that such a proceeding would be inappropriate or unnecessary in this situation. Under the 1996 Act, the Commission was directed to revise its rules to implement safeguards if necessary. 1996 Act at 202(f)(2). Instead, the *Order* merely announced a conclusion that regulatory safeguards were not necessary to accompany repeal of the cable/broadcast network cross-ownership rule, in direct contradiction to the mandate issued by Congress. In fact, as shown above, there are compelling reasons and ample evidence that such rules are necessary to protect diversity in programming for the viewing public. It is in the public interest to prevent any abuses by cable/broadcast network combinations before they occur, not after.


Even if the Commission ultimately disagrees with NASA's position, we and other interested parties should be given an opportunity to comment on the necessity of safeguards and to propose solutions. Interested parties should be allowed to present proposals of workable and nonintrusive safeguards that protect both competition and

diversity in programming. Thus, NASA strongly urges the Commission to either reconsider its decision in the *Order*, or to initiate a formal rulemaking proceeding, as contemplated by the 1996 Act, so that it may carefully and thoughtfully consider whether and which safeguards are necessary to ensure carriage, channel positioning, and non-discriminatory treatment of non-affiliated broadcast stations by cable systems affiliated with television networks.

Respectfully submitted.

THE NETWORK AFFILIATED
STATIONS ALLIANCE

By: 
KURT A. WIMMER
GERARD J. WALDRON
CATHERINE J. DARGAN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-7566
(202) 662-5278
*Counsel to the CBS Television
Network Affiliates Association*

By: 
WADE H. HARGROVE
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Post Office Box 1800
Raleigh, North Carolina 27602
(919) 839-0300
*Counsel to the ABC Television
Network Affiliates Association*

By: Werner K. Hartenberger

WERNER K. HARTENBERGER

DOW, LOHNES & ALBERTSON

A Professional Limited Liability Company

1200 New Hampshire Avenue, N.W.

Suite 800

Washington, D.C. 20036-6802

(202) 776-2000

Counsel to the NBC Television

Network Affiliates Association

May 8, 1996